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# In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

BUENTA M. OWENS, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

## REPLY BRIEF FOR THE APPELLANT

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Appellees urge this Court summarily to affirm the decision of the district court on the merits, which held unconstitutional the provisions of the Social Security Act in effect between 1979 and 1983 that granted benefits to widowed spouses, but not to surviving divorced spouses, who remarried after age 60. Appellees also urge the Court to dismiss the Secretary's appeal and "remand" it to the court of appeals insofar as the Secretary seeks review of the district court's award of relief to a nationwide class of persons who did not satisfy the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). Each of appellees' arguments is without merit.

1. a. Throughout the history of the Social Security Act, Congress has distinguished in a number of respects between spouses who were divorced and spouses who remained married. In *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976), the Court observed that "[d]ivorce by its nature

works a drastic change in the economic and personal relationship between a husband and wife," and the Court accordingly held that Congress could rationally assume that "divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." Similarly, in *Califano* v. *Jobst,* 434 U.S. 47 (1977), the Court sustained as "unquestionably valid" the general rule under the Social Security Act that eligibility for secondary benefits terminates upon marriage. The Court explained that "[b]oth tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status" (*id.* at 53). In the face of *DeCastro* and *Jobst,* appellees expressly concede that Congress was not required to provide Social Security benefits to surviving divorced spouses, and they likewise do not challenge the validity of the general marriage rule under the Social Security Act. See Mot. to Dis. or Aff. 15, 17.

Appellees argue, however, that because Congress elected, beginning in 1979, to permit *widowed* spouses to receive survivors benefits based on their former spouses' accounts even if they remarried after age 60, Congress also was required to provide such benefits to surviving *divorced* spouses who remarried after age 60. The premise of appellees' argument is that because Congress chose to permit certain divorced spouses to receive the same survivors benefits that widowed spouses receive upon the death of the primary wage earner, Congress must have determined that the two categories are identically situated upon the death of the primary wage earner; having so determined, the argument proceeds, Congress could not rationally determine that there are *any* differences between these two categories of survivors upon remarriage. See Mot. to Dis. or Aff. 15-16, 17-18. This argument is seriously flawed.

The mere fact that Congress chose to make surviving divorced spouses eligible for survivors benefits in certain circumstances does not mean that Congress found that surviving divorced spouses and widowed spouses are identically situated even upon the death of the primary wage earner. To the contrary, this Court held in *De Castro*—which was decided in 1976, well after Congress first had made some surviving divorced wives eligible for survivors benefits in 1965 (Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 376; see J.S. 3)—that it was rational for Congress to assume that divorced husbands and wives generally depend less on each other for financial and other support than do couples who stay married.

There is no reason to believe that Congress was of a different view regarding the relative dependency of married and divorced spouses in 1977, when it retained the eligibility of certain divorced spouses for survivors benefits upon the death of the primary wage earner but enacted the distinction (challenged by ~~cross-appellants~~ appellees) with regard to eligibility for such benefits after remarriage. Rather, Congress presumably concluded in 1977 only that divorced spouses were likely to have been dependent upon the deceased wage earner to a sufficient extent (even if not with the *same* degree of likelihood and to the *same* extent as spouses who had remained married to the primary wage earner until his death) to warrant treating them similarly to widows or widowers upon the death of the primary wage earner. It is fully consistent with this conclusion for Congress at the same time to have believed that significant differences nevertheless remained between widowed spouses and surviving divorced spouses. Accordingly, there was nothing irrational about Congress's continuing to give effect to those differences in the 1977 amendments by treating widowed spouses who remarry after age 60 more favorably than surviving divorced spouses who remarry.

The rationality of this differing treatment is further supported by the fact that benefits paid to a surviving divorced spouse are not subject to or counted against the ceiling that is placed on the total amount of benefits that may be paid on a single wage earner's account at any one time. See 42 U.S.C. 403(a)(3)(C). Thus, for example, if the primary wage earner had remarried after the divorce, both the widowed spouse and the surviving divorced spouse could be eligible for the full amount of survivors benefits when the primary wage earner died, without regard to the statutory ceiling. It was reasonable for Congress to terminate that multiple eligibility upon the remarriage of the surviving divorced spouse, even if it occurred after age 60. Congress rationally could determine that, at that point, the surviving divorced spouse should look to his new spouse, not to the Social Security account of the former spouse, for any necessary support.

Moreover, the purpose of secondary benefits under the Social Security Act is to afford adequate protection to the wage earner's family as a unit. *Jobst,* 434 U.S. at 52; *Califano* v. *Goldfarb,* 430 U.S. 199, 208-209 (1977) (opinion of Brennan, J.). In the case of a surviving divorced spouse, the family ties were broken prior to the primary wage earner's death, whereas in the case of a widowed spouse, the family ties were never actually broken at all. It therefore was reasonable for Congress to conclude that a widowed spouse has a stronger equitable claim upon remarriage to retain his entitlement to survivors benefits derived from the prior family arrangement than does the surviving divorced spouse.

b. The only decision of this Court upon which appellees rely in arguing that the statutory distinction at issue here is unconstitutional is *Hooper* v. *Bernalillo County Assessor,* No. 84-231 (June 24, 1985). See Mot. to Dis. or Aff. 18-20. That decision, however, has no bearing on this case. There,

the Court held that a New Mexico statute that granted a tax credit to Vietnam era veterans only if they resided in the State before May 8, 1976, violated the Equal Protection Clause because a state may not legitimately favor long-time residents over more recent arrivals in distributing benefits. Slip op. 9-11. In this case, by contrast, there is nothing inherently illegitimate about a distinction between widowed spouses and divorced spouses.

2. a. Appellees make essentially no effort to rebut our submission (J.S 18-26) that the district court's judgment is inconsistent with the text of 42 U.S.C. 405(g), implementing regulations, and the decisions of this Court insofar as it grants relief to a class of persons who had not exhausted their administrative remedies or obtained judicial review within 60 days of the Secretary's final decision on their claims for benefits. Perhaps recognizing the weakness of their position, appellees instead attempt to persuade this Court not to review the district court's jurisdictional rulings. They argue (Mot. to Dis. or Aff. 23-26) that, if the Court summarily affirms the district court's ruling on the constitutional issue, it should dismiss the Secretary's appeal on the jurisdictional issues under 42 U.S.C. 405(g) and "remand" that portion of the appeal to the court of appeals.

Even if the Court were to affirm on the constitutional issue, there would be no support for appellees' novel suggestion that the Court should dismiss the Secretary's appeal from the district court's award of relief to class members over whom it plainly had no jurisdiction. To the contrary, this suggestion flies in the face of this Court's repeated recognition that once the Court has assumed jurisdiction under 28 U.S.C. 1252 over an appeal raising a constitutional issue, the "whole case" is to come before the Court. See, *e.g.*, *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 13 n. 21; *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip

op. 8, 9 & n.12, 14. Under this principle, if the Court were to affirm the district court's ruling on the merits, it still would be necessary for the Court to review the scope of the district court's judgment in order to determine the proper application of its holding that an Act of Congress is unconstitutional.

Nor is there any authority for appellees' equally novel suggestion that the Court may "remand" a portion of the Secretary's appeal to the court of appeals, even though the appeal had not previously been in that court.* It is significant in this regard that Congress, in 28 U.S.C. 1631, provided for the transfer of appeals from one court to another only in certain limited circumstances. Under Section 1631, if an appeal is taken to a court that does not have jurisdiction, that court may transfer the case to another court in which the appeal could have been brought at the time the original appeal was taken. Section 1631 plainly has no application here. This Court *does* have jurisdiction over the "whole case"—including the jurisdictional issues under 42 U.S.C. 405(g)—by virtue of the Secretary's direct appeal under 28 U.S.C. 1252 raising the constitutional issue, and

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*Compare *Minnesota Public Interest Research Group* v. *Selective Service System*, No. 83-637 (July 5, 1984). There the appeal in question had originally been taken to the court of appeals under 28 U.S.C. 1291, and it subsequently was transferred to this Court pursuant to the second paragraph of 28 U.S.C. 1252 after a direct appeal on the constitutional issue was taken to this Court pursuant to the first paragraph of 28 U.S.C. 1252. After this Court disposed of the government's direct appeal under the first paragraph of Section 1252 (see *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276 (July 5, 1984)), the Court vacated the court of appeals' order transferring the related appeal to this Court under the second paragraph of Section 1252 and transferred that appeal back to the court of appeals. In the instant case, by contrast, the Secretary did not take a separate appeal to the court of appeals on the issues arising under 42 U.S.C. 405(g); those issues are presented as part of a single appeal from the district court's judgment.

an appeal raising the jurisdictional issues could *not* have been taken to the court of appeals under 28 U.S.C. 1291 at the time the Secretary took a direct appeal to this Court under the first paragraph of 28 U.S.C. 1252, because 28 U.S.C. 1291 expressly excludes from the jurisdiction of the courts of appeals any case "where a direct review may be had in the Supreme Court."

b. As we have explained (J.S. 25-26), the rulings by the district court on the exhaustion and 60-day filing requirements under 42 U.S.C. 405(g) independently warrant review by this Court. We also have asked the Court to grant review on questions of jurisdiction under 42 U.S.C. 405(g) in *City of New York* v. *Heckler*, petition for cert. pending, No. 84-1920. There are, however, differences between the two cases that warrant the Court's granting of plenary review in both.

In this case, the named appellees invoked the special mechanism the Secretary has established by regulation for dispensing with the exhaustion requirement where the only issue involved is the constitutionality of a provision of the Social Security Act and where the Secretary and the claimant have stipulated that all other factual and legal issues bearing on that individual's particular claim for benefits have been resolved at the preliminary stages of administrative review. The availability of an expedited exhaustion procedure in this limited category of cases (compare *Weinberger* v. *Salfi*, 422 U.S.C. 749, 766-767 (1975)) demonstrates that the Secretary has not determined that exhaustion would be futile or should be dispensed with for other claimants with whom she has not entered into a comparable stipulation—including the unnamed class members in the instant case and the class members in *City of New York*. See J.S. 6-8, 19-21. Similarly, the district court's rationale for dispensing with the 60-day filing requirement in this case—that the running of the 60-day period was tolled on a

nationwide basis for all class members from the date on which appellee Buenta Owens filed her request for administrative reconsideration of the initial denial of her claim for benefits (see J.S. 10, 21-25; J.S. App. 21a-22a)—differs from the rationale for dispensing with the 60-day filing requirement on a class-wide basis adopted by the Second Circuit in *City of New York*.

Thus, in order for the Court to address the jurisdictional issues under 42 U.S.C. 405(g) in a definitive fashion and to resolve the uncertainty and widespread disruption of the Social Security program that have been occasioned by the divergent rulings of numerous lower courts on these questions, we believe that it would be beneficial for the Court to consider this case together with *City of New York*.

For the foregoing reasons and the additional reasons stated in the Jurisdictional Statement, it is respectfully submitted that probable jurisdiction should be noted.

CHARLES FRIED
*Acting Solicitor General*

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